No. 89-1197

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CITY OF ST. GEORGE,
Petitioner,

v.

PHILLIP L. FOREMASTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONER

T.W. SHUMWAY
City Attorney
CITY OF ST. GEORGE
175 East 200 North
St. George, Utah 84770
(801) 634-5800

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
NANCY A. TEMPLE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioner, City of St. George, Utah

* Counsel of Record

April 6, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases Page

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1197

CITY OF ST. GEORGE,

Petitioner,

v.

PHILLIP L. FOREMASTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF OF PETITIONER

Respondent, not surprisingly, devotes great rhetorical energy to asserting procedural or jurisprudential obstacles designed to persuade this Court to avoid the basic and fundamentally important constitutional holdings of the Tenth Circuit in this case. In the process, respondent seeks to preserve his right to collect significant attorneys fees, a result which respondent neglects to mention in his brief. Respondent's efforts ultimately should be unavailing, however, because neither the ripeness nor mootness doctrines properly should prevent a grant of certiorari.

The Tenth Circuit's first holding on the merits—that any "governmental subsidy directed at religious institutions and not required by the Free Exercise Clause conveys a message of endorsement"—will result in an enormous expansion in the amount of governmental conduct that will be invalidated under the Establishment Clause.

Respondent does not deny that. The court's other holding that the "primary effect" of governmental action is a question of fact for trial will have a similarly broad effect on Establishment Clause analysis, by leaving this sensitive constitutional question in the hands of a jury. Because the holdings of the Tenth Circuit on both these issues and on issues of standing are inconsistent with those of its sister circuits and with the prior holdings of this Court, review plainly is warranted.

1. Respondent argues that the issue of the constitutionality of the display of the St. George Temple on the City logo is moot because "the City has ceased its *pervasive display* of the City logo." Opp. 9 (emphasis added). In the next breath, respondent tells this Court that the same issue is not ripe because it has been remanded for trial under the newly articulated Tenth Circuit standard for determining the "primary effect" of the logo. Opp. 11-12. Neither of respondent's inherently contradictory arguments is correct.

First, with respect to mootness, the only change that has occurred since the respondent obtained his judgment is that the City has decreased the number of locations at which the logo is displayed—although the logo "remains" on display at various locations around City Hall. Opp. 10-11. Respondent does not explain how Article III jurisdiction or the First Amendment claim turns on the "pervasiveness" with which the City displays the logo. In fact, the *degree* to which the logo is displayed is irrelevant to respondent's claim that the *content* of the City logo is unconstitutional. The only possible issue to which this fact could be relevant is respondent's standing. But, if he is claiming that he no longer has standing on this issue, then the judgment of the district court, which so held, should be affirmed.

Second, with respect to the claim that the issue is not "ripe" until after trial is completed on remand, respondent simply is incorrect. Opp. 11-12. This Court "has

unquestioned jurisdiction" to review even interlocutory judgments of the federal courts and will do so where

> there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari . . .

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224-25 (1986). Here, the Tenth Circuit reversed the district court's entry of judgment for petitioner on the ground that the "primary effects" prong of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) requires a trial to determine "what an average observer would perceive when viewing the action of the City [in using the sketch of the temple as part of the logo]." Pet. App. 12a. Absent the Tenth Circuit reversing itself, nothing that occurs at that trial will make that legal holding more appropriate for review than it is now.

2. Respondent also argues that the issue of the electrical credit has been moot for "over three years" and therefore "does not meet Article III requirements for a live controversy." Opp. 10. This argument simply is disingenuous—the controversy is as "live" now as it was when *respondent appealed to the Tenth Circuit.* The City discontinued the "subsidy" in June 1986 after a third-party, the newly appointed President of the temple announced that he would undertake lighting the temple, regardless of any subsidy. The district court—on December 17, 1987—then denied respondent's request for attorneys fees on the ground that respondent was not a prevailing party. Pet. App. 40a.[1] Based *solely* on the denial of attorneys fees, respondent thereafter appealed to the Tenth Circuit, obtaining on August 3, 1989 the favorable rulings on

---

[1] The district court held that respondent "had no standing and hence did not and could not receive relief on the merits of his claim." Pet. App. 37a. Thus, respondent was not a prevailing party and was not eligible to collect attorneys fees related to this issue. Pet. App. 35a.

standing and on the merits of the Establishment Clause claims that are raised in the petition.[2]

If the tens of thousands of dollars in attorneys fees, alone or in conjunction with the threatened recurrence of the issue (see Pet. 3, n.3), were sufficient to create a "case or controversy" in the Tenth Circuit, then the same attorneys fees are sufficient to keep this case "alive" for purposes of the City's petition. If not—if the case has been "moot" for three years as respondent suggests—then the court below was without Article III jurisdiction to enter its judgment and mandate, and this Court has an obligation under the *Munsingwear* doctrine to remand with orders to the Tenth Circuit.

> to set aside [*i.e.*, vacate] the decree below and to remand the cause with directions to dismiss.

Duke Power Co. v. *Greenwood County*, 299 U.S. 259, 267 (1936); *United States* v. *Munsingwear Inc.*, 340 U.S. 36, 39-41 (1950) (citing additional cases).[3] This practice of "vacating the judgment below is *binding on the courts of appeals as well as the Supreme Court.*" *Supreme Court Practice*, at 723 (emphasis added). By vacating the judgment below, the federal courts avoid the *res judicata* and precedential effect of a judgment "review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

In sum, respondent cannot have it both ways. Either the issue is appropriate for review by this Court or the attorneys fee award should be vacated. But, respondent

---

[2] The Tenth Circuit specifically ordered that, on the electrical subsidy, the judgment of the district court was "reversed and remanded for a calculation of attorneys fees . . . ." Pet. App. 14a.

[3] See *Government of the Virgin Islands* v. *JDS Realty Corp.*, 108 S.Ct. 687 (1988) (petition granted "and the case is remanded . . . to consider the question of mootness"); *JDS Realty Corp.* v. *Government of the Virgin Islands*, 852 F.2d 66, 67 (3rd Cir. 1988) (claim on remand is "dismissed as moot" and "vacated with instructions to the district court to dismiss the action").

should not be permitted to collect a huge fee award based on a clearly incorrect legal theory and then insulate that award from review by claiming mootness.

3. With respect to respondent's standing to challenge the content of the City logo, petitioner demonstrated the conflict between the Sixth, Tenth and Eleventh Circuits—which hold that any offensive "contact" with a religious symbol provides standing to challenge the symbol—and the Seventh Circuit—which holds that "contact" alone is not enough. Pet. 11-13. Despite the fact that the court below *acknowledged* this conflict (Pet. App. 10a), respondent states that these conflicts were "harmonized" by this Court's earlier decision in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). That assertion is demonstrably false: the decisions in question, which were issued from 1983 to 1989, constitute conflicting interpretations of *Valley Forge*. See Pet. 11-14. Those conflicts cannot be deemed to have been "harmonized" by this Court's *prior* (1982) decision in *Valley Forge*.

4. Petitioner demonstrated that respondent's showing of "actual or threatened injury" sufficient to grant standing to challenge the electrical subsidy was "purely speculative" and inconsistent with this Court's holding in *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). The conflict arises from the fact that the Tenth Circuit simply *assumed* that "[h]ad the City collected the cost of free electricity provided to the temple, the revenues of the Utility would have been enhanced, eliminating the need for purchasers of electricity, including Foremaster, to pay for the amount used by the temple." Pet. App. 5a-6a. In opposition, respondent reinforces the existence of the conflict by simply *repeating*, without any supporting citation, the Tenth Circuit's erroneous factual assumption:

> Unquestionably, the years of free electricity [to light the Temple] resulted in either higher utility

> rates or higher municipal taxes . . . . Consequently, as a ratepayer or taxpayer, [respondent] suffered economic harm.

Opp. 17. The question presented arises from the fact that this "[u]nquestionabl[e]" (*id.*) assumption is in fact questionable—indeed, the assumption is incorrect.[4] By blindly accepting this assumption,[5] the Tenth Circuit's creation of "ratepayer" standing, is nothing more than "an ingenious academic exercise in the conceivable." *United States* v. *SCRAP*, 412 U.S. 669, 688-689 (1973) (requiring that allegations in support of Article III standing "must be true and capable of proof at trial").

In sum, the Tenth Circuit's adoption of a *per se* "ratepayer" standing doctrine conflicts with this Court's well-established requirements that a federal plaintiff establish by record proof that his injury "fairly can be traced to the challenged action," and is "likely to be redressed by a favorable decision" and, accordingly, the doctrine is worthy of review by this Court (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). See Pet. 14-17.

5. On the merits of the electrical subsidy, respondent refuses to defend—and in fact devotes not a single word to—the Tenth Circuit's principle holding that: "[a] gov-

---

[4] Respondent's electric bill was not affected by the $180 credit on the temple's electric bill. The electricity rates of the municipal utility are established on a standard ratemaking formula: rates are set based upon the cost of producing electricity (expense) plus a required rate of return (profit). The credit is treated as a donation, which is credited to profits, not expenses. Thus, the credit *does not increase the cost of production and thereby increase the rates paid by purchasers of electricity*; instead, it reduces the return to the shareholder, the City.

[5] The Tenth Circuit asserted, without any support in the record, that "[h]ad the City collected the cost of free electricity provided to the temple, the revenues of the Utility would have been enhanced, eliminating the need for purchasers of electricity, including Foremaster, to pay for the amount used by the temple." Pet. App. 5a-6a.

ernmental subsidy . . . not required by the Free Exercise Clause conveys a message of endorsement" in violation of the Establishment Clause. Pet. App. 8a. Respondent's silence confirms that the holding below constitutes an extraordinary view of the intersection of the Religion Clauses of the First Amendment. Such a holding is inconsistent with many decisions that have upheld benefits to religious groups that were not compelled by the Free Exercise Clause. See Pet. 18. Given the historic breadth of this Tenth Circuit holding—and its widespread effect on church-state relations, the question presented clearly warrants certiorari. See Pet. 19.

6. Finally, the Tenth Circuit's holding that the "primary effects" prong of the *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), requires a trial to determine the factual question "what an average observer would perceive when viewing the action of the City [in including the sketch of the temple on its logo]" (Pet. App. 12a) is inconsistent with decisions of the Seventh, Eighth and Ninth Circuits. Respondent's opposition ignores the conflict, but those circuits squarely have held, in circumstances irreconcilable with the decision below (see Pet. 19-20) that the "primary effect" analysis is a pure question of law subject to *de novo* review on appeal. *Id.*

Respondent's argument that a particular law might be challenged on its face or "as applied" simply misses the point. Opp. 23-24. A challenge to a law "as applied" requires a factual inquiry into what action the government *actually is taking*. See *Bowen* v. *Kendrick*, 108 S.Ct. 2562, 2580 (1988); *id.* at 2582 (Kennedy, J., concurring). That question is distinct from the question for which this case was remanded—*i.e.*, to determine how the "average observer" would characterize the "primary effect" of the governmental action. See Pet. 20-21. As Justice O'Connor noted in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the primary effects inquiry is not a question of fact, which may be resolved by reference to competing surveys of community perceptions:

> whether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is . . . in large part a *legal question* to be answered on the basis of *judicial* interpretation of social facts.

465 U.S. at 693-694 (O'Connor, J., concurring) (emphasis added). Treatment of this delicate constitutional inquiry as a question of fact for the jury would, at the very least, produce inconsistent results derived from the beliefs of jurors in a particular locality or the popularity or presence of a particular religion in the community. See Pet. 22. In either case, the question presented is an important one that should be reviewed by this Court.

* * * *

The Tenth Circuit's opinion is a veritable cooks' tour of the legal issues posed by the Religion Clauses. Unfortunately, its analysis is seriously flawed in all important respects and has done striking damage to both First Amendment and Article III doctrines in this area. A small community is now facing a claim for enormous attorneys fees as a consequence of these rulings. The Court should either vacate the basis for those fees—for the reasons conceded by respondent—or grant the petition and permit the City to challenge the legal errors in the opinion below.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

T.W. SHUMWAY
City Attorney
CITY OF ST. GEORGE
175 East 200 North
St. George, Utah 84770
(801) 634-5800

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
NANCY A. TEMPLE
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Petitioner,
City of St. George, Utah

* Counsel of Record

April 6, 1990